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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ANA M. OLIVAREZ, WARDEN OF THE
DEUEL VOCATIONAL INSTITUTION
OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MICHAEL SHERIDAN McKINNEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES D. WEISSELBERG*
MICHAEL J. BRENNAN
DENNIS E. CURTIS
CARRIE L. HEMPEL
Post-Conviction Justice Project
University of Southern California
Law Center
University Park
Los Angeles, California 90089-0071
Tel: (213) 740-2528; (213) 740-2586

ATTORNEYS FOR RESPONDENT
*Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should review fact-bound rulings by the District Court and the Court of Appeals that the admission of inflammatory propensity evidence denied Mr. McKinney a fundamentally fair trial, in violation of the Due Process Clause.

2. Whether the grant of habeas corpus relief, premised upon both the ancient prohibition against the use of propensity evidence and the long-standing constitutional guarantee of a fundamentally fair trial, announced a "new rule" under Teague v. Lane, 489 U.S. 288 (1989).

3. Whether the District Court's and the Court of Appeals' legal conclusions regarding the legal relevance of the propensity evidence violated the principle, set forth in Sumner v. Mata, 449 U.S. 539 (1981), that state court determinations of fact are presumed correct.

4. Whether the District Court and the Court of Appeals correctly ruled that the propensity evidence was not legally relevant to any essential elements of the prosecution's case.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 7

1. The District Court And The Court Of Appeals Correctly Granted Habeas Corpus Relief Upon A Finding That The Admission Of Evidence Regarding Mr. McKinney's Past Ownership Of Knives And So-Called "Commando Lifestyle" Denied Mr. McKinney A Fundamentally Fair Trial, In Violation Of The Due Process Clause. 7

2. The District Court's And The Court of Appeals' Grant Of Habeas Corpus Relief To Mr. McKinney Did Not Violate Teague v. Lane. 12

3. The District Court's And The Court Of Appeals' Determinations Regarding The Legal Relevance Of The Knife And "Commando Lifestyle" Evidence Did Not Violate Sumner v. Mata. 15

4. The District Court And The Court Of Appeals Correctly Ruled That The Knife And "Commando Lifestyle" Evidence Was Not Legally Relevant To Any Essential Elements Of The Prosecution's Case. . 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases:

Bisaccia v. Attorney General of New Jersey, 623 F.2d 307 (3d Cir.), cert. denied, 449 U.S. 1042 (1980) 10

Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710 (1993) 8, 10, 11, 13, 17

Collins v. Youngblood, 497 U.S. 37 (1990) 14

Desist v. United States, 394 U.S. 244 (1969) 13

Estelle v. McGuire, ___ U.S. ___, 112 S.Ct. 475 (1991) 6, 16, 17

Godinez v. Moran, ___ U.S. ___, 113 S.Ct. 2680 (1993) . . . 14

Jackson v. Virginia, 443 U.S. 307 (1979) 11

Kotteakos v. United States, 328 U.S. 750 (1946) 8, 10, 13

Lisenba v. California, 314 U.S. 219 (1941) 7, 8, 13

Osborne v. Wainwright, 720 F.2d 1237 (11th Cir. 1983) 10

Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. Unit B 1981) 10

Parke v. Raley, ___ U.S. ___, 113 S.Ct. 517 (1992) 14

Sumner v. Mata, 449 U.S. 539 (1981) 15, 16

Teague v. Lane, 489 U.S. 288 (1989) 12-14

United States v. Lovasco, 431 U.S. 783 (1977) 7, 8, 13

Walker v. Engle, 703 F.2d 959 (6th Cir.), cert. denied, 464 U.S. 951 (1983) 10

Constitutional Provisions:

Fourteenth Amendment to the United States Constitution Due Process Clause 5, 7, 8, 10, 13

Statutes and Rules:

28 U.S.C. § 2254(d) 15, 16

United States Supreme Court Rules, Rule 10.1.(a) 7, 12

STATEMENT OF THE CASE

On the night of January 28, 1984, Betty McKinney died in her bed of severe knife wounds to her throat and chest. Petition for Writ of Certiorari ("Pet.") at 11. Both her husband, Quentin McKinney, and her son, Respondent Michael McKinney, were in the house at the time. Pet. App. F at 145. There were no signs of forced entry into the home. Id. at 144-145. Both men were taken into custody and interrogated. Respondent's father, Quentin, had a folding buck knife in his possession, yet he was released the next day. Pet. App. A at 88; Pet. App. D at 119-120. Michael McKinney, on the other hand, an 18 year-old college student with no prior history of violent behavior, was detained, booked, tried, and found guilty of his mother's murder.

During the trial, the prosecution presented a case founded primarily upon circumstantial evidence, most of which raised ambiguous inferences. No murder weapon was ever found. Pet. App. F at 144-145. No testimony established what kind of knife caused the fatal wounds. Id. at 150. There were no eyewitnesses. The prosecution introduced a pair of dark camouflage pants and a pair of ski gloves, both soaked in Mrs. McKinney's blood. Pet. App. D at 119. Though the prosecution claimed that both of these items were owned and worn by Michael McKinney on the night of the murder, there was no direct evidence that McKinney had worn these items. In fact, McKinney testified that he had outgrown the pants and had never owned the ski gloves. Reporter's Transcript ("R.T.") at 657, 669-671, 727-735. Either McKinney or his father could have worn these items during

the last minutes of Betty McKinney's life. Moreover, a shirt owned by Quentin McKinney, soaked in Mrs. McKinney's blood, was also found at the crime scene. Pet. App. D at 119.

Without any conclusive evidence, the prosecution hinged its case upon inflammatory propensity evidence. The prosecution tried to portray Mr. McKinney as living a so-called "commando lifestyle." Pet. App. A at 101-102; Pet. App. I at 181. With this evidence, the prosecution implied that Mr. McKinney was more likely than not to have murdered his mother. Pet. App. A at 101-102. For example, during the cross-examination, the prosecutor asked Mr. McKinney if he "was familiar with . . . techniques . . . used by commando type soldiers." R.T. 751-752. The prosecutor asked Mr. McKinney about daggers that have black blades, so as not to reflect light, and whether black blades are "the sort of knives that are favored . . . by commando type people . . . ." R.T. 751; Pet. App. A at 102. The prosecutor elicited testimony from Mr. McKinney's roommate that "during a power outage at school, [McKinney] strapped his knife on, went out somewhere and stayed out 'half the night.'" Pet. App. F at 149-150.

The prosecutor also tried to link Mr. McKinney's so-called "commando lifestyle" with his wearing of camouflage pants, at the time a widespread college fad. Pet. App. A at 93; R.T. 459-460. The prosecution even went so far as to elicit testimony that Mr. McKinney had once "dressed up like a soldier," with a knife on his arm, to see the movie "Apocalypse Now." R.T. 753-755. These few examples are not exhaustive, and after all this extensive and highly prejudicial testimony, the prosecutor still never really

explained what a "commando lifestyle" was, merely leaving it to the jury's imagination.

To further support the "commando lifestyle" claims, the prosecution also introduced into evidence three military-type daggers, two of which had been owned by Mr. McKinney at one time or another. Two of the knives had no possible connection to the crime. One knife had been confiscated by the police in September 1983, four months before the murder took place. Pet. App. A at 88. Mr. McKinney originally bought that knife after he was repeatedly robbed on his way home from work. R.T. 747. Another had never been owned by Mr. McKinney. The prosecutor himself purchased this knife, a black bladed "Tekna" dagger, for use during the trial. Pet. App. D at 120. McKinney bought the last of the three knives in 1983. R.T. 667-668. Costa Potamianos, a friend of Mr. McKinney, testified that McKinney gave him this knife before Thanksgiving, 1983, several months before Mrs. McKinney died. Pet. App. A at 88. Mr. McKinney's college roommate, however, testified that he had seen Mr. McKinney with a similar knife in December, 1983. Pet. App. A at 89.

Mr. McKinney's counsel properly objected to the introduction of the knives. He pointed out that the introduction of these knives and the testimony about them could only be used as evidence of Mr. McKinney's character, leading the jury to "infer that he is the kind of person who is bad." R.T. 31. When pressed by the trial judge, the State responded that the knives were relevant to the case, stating that the "blade configuration" of the knives would match Mrs. McKinney's wounds. R.T. 376. Upon these assurances, the trial court admitted the knives. R.T.

36; R.T. 379.

The coroner's testimony did not support the prosecutor's bald statement. The coroner testified that a simple home kitchen knife could have inflicted Betty McKinney's wounds. Pet. App. F at 150. There was nothing distinctive about the wounds which would allow the coroner to say that they were created by a dagger as opposed to, say, a one-edged kitchen knife. Thus, the prosecution was ultimately unable to demonstrate any link between the knives and Betty McKinney's wounds.

One other bit of highly inflammatory evidence reached the jury. The prosecution put Christopher Roderick on the stand to testify that sometime after Thanksgiving, 1983, Mr. McKinney had scratched the words "Death is His" on the closet door of his dormitory room with a dagger, and then menacingly stuck the knife into the wall. Pet. App. F at 148-149. The prosecution put in color photographs of the scratching. Pet. App. F at 149. As the District Court held, this evidence was "undoubtedly devastating." Pet. App. F at 157.

None of the so-called "commando lifestyle" evidence or "Death is His" evidence should have gone to the jury. None of this evidence was even remotely probative of anything resembling opportunity, motive or modus operandi. The wounds suffered by Mrs. McKinney were not the signature slashes of any particular knife or style of attack, "commando" or otherwise. And Mr. McKinney had no history of violence; none of this disputed evidence could come in as a prior similar act. Any type of knife could have accomplished the murder, and there was no evidence that the killing was done with any particular "style."

Upon hearing this collection of highly prejudicial-and entirely circumstantial evidence, the jury returned a verdict finding Mr. McKinney guilty of first-degree murder. Pet. App. D at 116. He was sentenced to 26 years to life in prison. R.T. 1174.

After exhausting his state remedies, Mr. McKinney filed a federal habeas corpus petition. The District Court found that the admission of the character evidence had unduly prejudiced Mr. McKinney's trial, for "he was tried and convicted as much on evidence of his past history with knives as he was on evidence directly related to the murder." Pet. App. F at 157. Because of this, and the fact that the "evidence against [McKinney] was entirely circumstantial, and was far from overwhelming," the District Court ruled that Mr. McKinney was "deprived of his right to a fundamentally fair trial under the Due Process Clause of the Constitution of the United States." Pet. App. F at 157-158. Based upon this Due Process Clause violation, the District Court granted Mr. McKinney's habeas corpus petition. Pet. App. F at 160-161.

The State appealed this decision to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals upheld the District Court's ruling, similarly finding that the introduction of character evidence had rendered Mr. McKinney's trial fundamentally unfair. Pet. App. D at 135.

The State then filed its first Petition for a Writ of Certiorari to this Court. The Petition was granted, the judgment below was vacated, and the case was remanded back to the Court of Appeals for reconsideration in light of this Court's decision in

Estelle v. McGuire, ___ U.S. ___, 112 S.Ct. 475 (1991). Pet. App. C at 113.

On remand, the Court of Appeals carefully considered the application of Estelle v. McGuire to this case. The court again found for Mr. McKinney, holding that "the erroneous admission of propensity evidence rendered McKinney's trial fundamentally unfair in violation of the Due Process Clause . . . ." Pet. App. A at 104. The State again seeks review in this Court.

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REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner's application for a Writ of Certiorari should be denied. This case involves no new issues. It presents no burning controversies and, by its nature, is entirely fact-bound. Contrary to the State's Petition, the decisions below by no means "departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Pet. at 14-15 (quoting United States Supreme Court Rules, Rule 10.1.(a)). Rather, the District Court's and the Court of Appeals' grant of habeas corpus relief to Michael McKinney was a textbook application of settled legal doctrine.

1. The District Court And The Court Of Appeals Correctly Granted Habeas Corpus Relief Upon A Finding That The Admission Of Evidence Regarding Mr. McKinney's Past Ownership Of Knives And So-Called "Commando Lifestyle" Denied Mr. McKinney A Fundamentally Fair Trial, In Violation Of The Due Process Clause.

This Court has long held that criminal defendants are entitled to a fundamentally fair trial. See Lisenba v. California, 314 U.S. 219, 236 (1941); United States v. Lovasco, 431 U.S. 783, 790 (1977). In deciding whether Mr. McKinney was entitled to habeas corpus relief, the courts below simply followed this Court's two-step analysis. First, the courts determined whether the admission of the propensity evidence was an error of such magnitude that it violated the defendant's right

to a fundamentally fair trial, as guaranteed by the Due Process Clause of the Fourteenth Amendment. See Lisenba, 314 U.S. at 236. Second, if so, the courts asked whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710, 1713 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).[1]

This Court has defined the denial of due process in a state criminal trial as the "failure to observe that fundamental fairness essential to the very concept of justice . . . [where] the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." Lisenba, 314 U.S. at 236; see also Lovasco, 431 U.S. at 790. The Court of Appeals properly applied this basic standard. In order to determine whether Mr. McKinney was denied "that fundamental fairness essential to the very concept of justice," the Court of Appeals examined the history of the traditional principle barring the admission and use of propensity evidence. The Court of Appeals traced the principle back to seventeenth-century England and to the American colonies, and further noted that the principle is established not only in the Federal Rules of Evidence, but also in the laws of all fifty States. Pet. App. A at 83-85 & n.2. The court expressed the fundamental fairness test as "whether, under the facts of this

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[1] The District Court found that Mr. McKinney "would probably not have been convicted" without the propensity evidence. Pet. App. F at 158. The Court of Appeals specifically applied Brecht, which was decided while this case was on appeal. Pet. App. A at 104-109.

case considered as a whole, the admission of irrelevant character evidence did violate due process." Pet. App. A at 99.

The Court of Appeals then analyzed the character evidence in the context of the facts of the case as a whole, and found that it "served only to prey on the emotions of the jury, to lead them to mistrust McKinney, and to believe more easily that he was the type of son who would kill his mother in her sleep without much apparent motive." Pet. App. A at 102. "The jury was offered the image of a man with a knife collection, who sat in his dormitory room sharpening knives, scratching morbid inscriptions on the wall, and occasionally venturing forth in camouflage with a knife strapped to his body." Id. Finding the trial thus "impermissibly tainted," the Court of Appeals ruled that the "erroneous admission of propensity evidence rendered McKinney's trial fundamentally unfair in violation of the Due Process Clause . . . ." Pet. App. A at 103-104.

Contrary to the State's assertions, there was no attempt by the Court of Appeals to create a new, widely applicable "per se" rule. Pet. at 33-34. Indeed, the Court of Appeals was extremely careful to limit its analysis to the facts of this case. The Court of Appeals, after close analysis, found that the admission of the "commando lifestyle" and knife evidence deprived Mr. McKinney of a fundamentally fair trial, because he was convicted on the basis of this evidence. This is the only holding that comes out of this unremarkable case.

The decision below was also fully consistent with rulings in other Circuits. In rare cases, other Circuits have found that evidentiary errors, such as the introduction of propensity

evidence, have denied a defendant a fundmentally fair trial. See, e.g., Osborne v. Wainwright, 720 F.2d 1237 (11th Cir. 1983) (remand to decide whether admission of exceptionally gruesome photographs in a closely balanced case so inflamed the jury as to deny defendant a fundamentally fair trial); Walker v. Engle, 703 F.2d 959 (6th Cir.), cert. denied, 464 U.S. 951 (1983) (cumulative effect of evidentiary errors denied fundamental fairness); Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. Unit B 1981) (admission of evidence of a prior conviction had only gone to propensity and had denied defendant a fundamentally fair trial); Bisaccia v. Attorney General of New Jersey, 623 F.2d 307 (3d Cir.), cert. denied, 449 U.S. 1042 (1980) (admission of evidence of co-conspirator's guilty plea violated due process). To decide the fundamental fairness questions in the above cases, the Courts of Appeals undertook the same analysis that the court below did in this case. The court below engaged in a highly fact-specific analysis of the case as a whole to determine whether fundamental fairness was violated.

Upon concluding that the admission of character evidence deprived Mr. McKinney of a fundamentally fair trial, the Court of Appeals moved to the second step in the analysis: whether the introduction of the propensity evidence was harmless error under the standard announced in Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710 (1993). In Brecht, this Court held that a federal court, upon a finding of error that may merit habeas corpus relief, must determine whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht, 113 S.Ct. at 1713 (quoting Kotteakos). The court below

faithfully applied this test, and found that "the erroneously admitted character evidence was . . . just the sort of evidence likely to have a strong impact on the minds of the jurors." Pet. App. A at 106.

Not content with this result, the State now wants this Court to revisit the harmless error test, even though Brecht was decided only last term. Pet. at 39. The State seems to want to fold the fundamental fairness inquiry and the harmless error inquiry into an sufficiency of the evidence test based on Jackson v. Virginia, 443 U.S. 307 (1979). See Pet. at 38-39. The State argues that for McKinney to be entitled to habeas corpus relief, he must show that after "excluding the character evidence, the [evidence] would not be substantial enough to allow a reasonable trier of fact to rationally conclude he was guilty . . . ." Id. There is no reason to revisit Brecht now, only seven months after it was decided, and before there is any indication that there is confusion in the lower courts about Brecht's application.

Furthermore, the State's proposed test simply makes no sense in this context. The problem with Mr. McKinney's trial was that the jury heard inflammatory testimony that influenced the way the jury considered the rest of the evidence. The Jackson v. Virginia standard does not relate to tainted evidence that injects the jury's deliberation; rather, courts applying Jackson ask whether the quantum of evidence presented was sufficient for conviction. Applying the Jackson test when inflammatory evidence has been introduced would invite a court to guess how a hypothetical jury would have functioned had that jury not heard the tainted evidence. Such a course would ignore the real impact

of the prejudicial evidence upon the actual jury. It is not possible to apply some sort of "rational jury" standard, because the introduction of propensity evidence made it likely that Mr. McKinney's actual jury was not functioning like a hypothetical rational jury.

In sum, having found that the admission of the knife evidence and the "commando lifestyle" testimony so poisoned Mr. McKinney's trial as to make it fundamentally unfair, and that this unfairness had "substantial and injurious effect or influence in determining the jury's verdict," the courts below granted Mr. McKinney's Petition for a Writ of Habeas Corpus. This is all that the courts below did. No new rules were created, and the grant of relief certainly did not "depart[] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." United States Supreme Court Rules, Rule 10.1.(a). Because the courts below uncontroversially applied settled doctrine, the Petition for a Writ of Certiorari should be denied.

2. The District Court's And The Court of Appeals' Grant Of Habeas Corpus Relief To Mr. McKinney Did Not Violate Teague v. Lane.

As discussed above, the courts below did nothing unusual, new, or "stealthy" in this case. See Pet. at 55. No new rule of constitutional criminal procedure was created or applied. The courts below straightforwardly applied three settled doctrines in their grant of relief to Mr. McKinney. First, the courts below found that the admission of the knife and "commando lifestyle"

evidence had violated the centuries-old, universally accepted principle that prohibits the use of character evidence to show propensity. Second, the courts below found that, upon an analysis of the facts of the case as a whole, the admission of the character evidence had rendered the trial fundamentally unfair, in violation of the Due Process Clause. This constitutional rule also is not new. For many years, this Court has held that the Due Process Clause guarantees defendants the right to a fundamentally fair trial. See Lisenba v. California, 314 U.S. 219 (1941); United States v. Lovasco, 431 U.S. 783 (1977). Third, the courts below applied the Brecht harmless error test, concluding that the Due Process error had a "substantial and injurious effect or influence in determining the jury's verdict." Pet. App. A at 108 (quoting Brecht, 113 S.Ct. at 1713 and Kotteakos, 328 U.S. at 776). Applying the tests required by this Court's precedents to the facts of this case, the courts below granted relief. Thus, since there was no "new" rule applied, there was no violation of Teague v. Lane.[2]

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[2] Furthermore, even if this Court somehow considers the decision below to state some new rule, this case also fits within an important exception to the Teague doctrine. This exception allows for the retroactive application of a new rule of constitutional criminal procedure if it reviews trial procedures that "implicate the fundamental fairness of the trial." Teague, 489 U.S. at 312 (O'Connor, J.). In Teague, Justice O'Connor cited Justice Harlan's point in Desist v. United States, 394 U.S. 244 (1969) that "one of the principal functions of habeas corpus was 'to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted,' and . . . 'from this that all "new" constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas.'" Teague, 489 U.S. at 312 (O'Connor, J.) (quoting Desist, 394 U.S. at 262).

The fundamental fairness principle at issue in Mr. McKinney's case is just such a rule, for it assures that a

In any event, the State has waived any possible defense based on Teague. Teague was decided by this Court on February 22, 1989, while Mr. McKinney's habeas corpus petition was still pending before the District Court. Although Teague was decided four years ago, the first time the State raised Teague was in its second Petition for Rehearing and Suggestion for Rehearing En Banc in the Ninth Circuit, filed on June 21, 1993. In the meantime, the State missed at least seven opportunities to raise the defense. The State failed to raise Teague in its district court pleadings. It failed to raise Teague in its Opening and Reply Briefs in the Court of Appeals. The State failed to raise Teague in its initial petition for rehearing and suggestion for rehearing en banc, filed in 1990. It did not raise Teague in its first Petition for a Writ of Certiorari to this Court. The State omitted Teague from the two Supplemental Briefs that it filed in the Court of Appeals upon remand from this Court. The first time that Petitioner raised Teague was in its second petition for rehearing and suggestion for rehearing en banc, filed in 1993. Teague is not jurisdictional, and the State's failure to raise Teague amounts to a waiver. See Collins v. Youngblood, 497 U.S. 37, 41 (1990); Parke v. Raley, ___ U.S. ___, 113 S.Ct. 517, 521 (1992); see also Godinez v. Moran, ___ U.S. ___, 113 S.Ct. 2680, 2685 n.8 (1993) (Blackmun J., dissenting). Based on the State's

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defendant will be convicted on the relevant facts presented at trial, and not on the basis of his or her potential propensities or "lifestyle." Thus, even if the Court of Appeals' application of the fundamental fairness doctrine to the facts of this case could somehow be considered a new rule, it should be applied retroactively to Mr. McKinney because of the grave due process concerns involved.

failure to raise Teague for over four years, it should not be permitted to raise it at this late date. Thus, the State's Teague claim should be deemed waived.

3. The District Court's And The Court Of Appeals' Determinations Regarding The Legal Relevance Of The Knife And "Commando Lifestyle" Evidence Did Not Violate Sumner v. Mata.

In its Petition, the State argues that in reviewing Mr. McKinney's case on direct appeal, the California Court of Appeal drew inferences from the knife and "commando lifestyle" evidence and that, under Sumner v. Mata, 449 U.S. 539 (1981), these inferences must be respected by the federal courts.[3] This argument is founded upon a misreading of the California court's opinion in this case.

On direct appeal, Michael McKinney challenged the legal relevance of the character evidence, as well as the constitutionality of its use. The state appellate court analyzed Mr. McKinney's relevance argument and rejected it, finding that the knife and "commando lifestyle" evidence were legally relevant to the prosecution's case. Pet. App. I at 193-203. Relevance, the State admits, is a legal issue, not a factual determination, and is thus outside the scope of Sumner v. Mata. Pet. at 62.

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[3] Interpreting 28 U.S.C. § 2254(d), Sumner v. Mata stands for the proposition that in habeas corpus matters, federal courts are bound to accept the "factual determinations of all state courts." 449 U.S. at 547. Section 2254(d) states that "a determination after a hearing on the merits of a factual issue . . . shall be presumed to be correct . . . ."

Because relevance is a legal question, a state court's determination of relevance is reviewable by a federal court.

Thus, because the state court's findings were inextricably linked to the legal issue of relevance, the federal grant of relief did not violate 28 U.S.C. § 2254(d) or Sumner v. Mata.

4. The District Court And The Court Of Appeals Correctly Ruled That The Knife And "Commando Lifestyle" Evidence Was Not Legally Relevant To Any Essential Elements Of The Prosecution's Case.

In Estelle v. McGuire, ___ U.S. ___, 112 S.Ct. 475 (1991), this Court held that in a case against a man accused of murdering his infant daughter, the admission of evidence regarding the infant's previous injuries did not make the trial fundamentally unfair. The challenged evidence included two physicians' testimony that the prior injuries suffered by the infant could only have been intentionally inflicted, and that the infant "was a battered child." Id. at 478. Finding that the evidence went toward the crucial element of intent, and was thus relevant, the Supreme Court reversed the Ninth Circuit's grant of habeas corpus relief to McGuire.

The Court remanded Mr. McKinney's case for reconsideration in light of Estelle v. McGuire. On remand, the Court of Appeals carefully considered Estelle, and found that it did not control this case. Indeed, no Estelle-type situation even remotely exists here. The court below premised its discussion on the point reiterated in Estelle that "'the category of infractions

that violate "fundamental fairness"' is a very narrow one." Pet. App. A at 81 (citation omitted). In its discussion of the facts, the court below further noted that "[i]n Estelle, the Supreme Court found that the 'battered child syndrome' evidence was relevant to the intentional nature of the injuries that killed the child, a fact of consequence." Pet. App. A at 82. Thus, the court noted that the battered child evidence at issue in Estelle "was admissible to prove intent." Pet. App. A at 90.

By contrast, in this case, the fact that Mr. McKinney once owned double-edged daggers, or wore camouflage pants (which were a fad at his college) does not show anything remotely resembling intent, or any other fact of consequence. Nor does the evidence show anything like motive or modus operandi. Rather, this evidence, unlike the evidence at issue in Brecht, was found to be entirely irrelevant. The only purpose of this evidence was to paint a picture for the jury of Mr. McKinney as a crazed commando-type "who sat in his dormitory room sharpening knives, scratching morbid inscriptions on the wall, and occasionally venturing forth in camouflage with a knife strapped to his body." Pet. App. A at 102. It is exactly this prosecutorial tactic that the principle against the use of propensity evidence was designed to prevent. Thus, the grant of habeas corpus relief was perfectly appropriate.

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CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

November 11, 1993

Charles D. Weisselberg

Charles D. Weisselberg*
Michael J. Brennan
Dennis E. Curtis
Carrie L. Hempel
Post-Conviction Justice Project
University of Southern California
Law Center
University Park
Los Angeles, CA 90089-0071
Tel: (213) 740-2528; (213) 740-2586

Attorneys for Respondent
*Counsel of Record

On The Brief:

Seth M.M. Stodder
Law Student Intern